

UN SECURITY COUNCIL RESOLUTIONS AS AUTHORIZATION FOR THE USE OF FORCE

Collective Security under Chapter VII of the UN Charter

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1 Introduction

1.1 Subject and purpose of the thesis

The subject of this thesis is how Security Council resolutions in practice and as a matter of law function as authorization for the use of force. The Security Council is empowered to adopt measures involving the use of force pursuant to Article 42 in Chapter VII of the United Nations Charter. This is one of few circumstances where the use of force is accepted as legally justified.

Article 42 remained inoperative during most of the Cold War, as the Council's five permanent members used their veto to block nearly every attempt to adopt a resolution authorizing force. Thus, the Council was seldom able to take effective action in accordance with its primary responsibility for the maintenance of international peace and security pursuant to the UN Charter Article 24(1). The end of this era enabled the Security Council to be considerably more active, and it has adopted a large number of resolutions. At the same time international relations have evolved in a way that was unforeseen when the Charter was drafted. The UN was a response to the atrocities of the Second World War, which led the international community to form an organization to prevent this from happening again, and to secure peace and security between states. Today's conflicts are rarely inter-state conflicts. Instead we have seen an increase in internal conflicts, and situations with long-lasting civil wars which represent new challenges for the international community.

In this thesis I will focus on three main problems for discussion. The first is the powers of the Security Council under the Charter to authorize the use of force, and how these powers are limited by rules of law. Secondly, how does the Security Council apply its powers to authorize force? Thirdly, how are resolutions interpreted and acted upon by states, and how does this correspond with the intentions behind the resolutions.

1.2 Sources of law

In this thesis, I will analyse Security Council resolutions concerning situations where the use of force has been authorized. My main focus is on three situations, namely Korea, Iraq and Kosovo. Hence, resolutions relating to these states will be thoroughly examined. Furthermore, I will consider other situations which illustrate the application of Council resolutions. The legal basis of Security Council resolutions is the UN Charter. In connection with this, I will discuss the provisions and the purposes and principles of the Charter. Chapter VII is concerned with the Council's powers regarding authorizations of force. Consequently, the provisions of this Chapter will be examined with particular focus. There is no treaty directly regulating the interpretation of Security Council resolutions. However, the Vienna Convention on the Law of Treaties of 23 May 1969 will be applied in this thesis as a guideline. Because of the lack of a directly applicable treaty, international customary law is the principal source of law. As the International Court of Justice is the principal judicial organ of the United Nations, its decisions will also be relevant in connection with Council authorizations to use force. The Statute of the International Court of Justice of 26 June 1945 will also be applied. Furthermore, I will use literature on international law and articles in journals and newspapers concerning this. My main approach will be to identify legal arguments and rules, which I will primarily discuss in connection with actual situations. Because politics and international law is so closely connected, some legal assessments compared to political considerations will also be discussed.

1.3 The use of force by states

The Council's power to authorize force is an exception from the general prohibition of the use of force. The UN Charter Article 2(4) states that

“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

According to this article, not only is the use of force prohibited, it is also illegal to threaten to use force. Brownlie's definition of a threat to use force is that it consists

“in an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government”.¹ The prohibition only applies in a state’s “international relations”, which means that it does not impose an obligation to refrain from the threat or use of force within a state’s own jurisdiction. The phrasing “against the territorial integrity or political independence of any States” was not meant as a limitation of the principle, but was inserted to strengthen the guarantee against intervention.²

There have been discussions whether the term “force” only includes the use of armed force, or if for example the use of economic coercion, etc. is prohibited under Article 2(4).³ However, the majority of scholars, Member States and UN organs regard this provision to apply exclusively to the use of armed force.

In the *Nicaragua* case the International Court of Justice regarded the prohibition of force as a principle of customary international law.⁴ This means that this is binding upon all states, regardless of whether or not they are members of the United Nations.

In addition to measures authorized by the Security Council under Article 42 of the Charter, there are a few other exceptions from the general principle of the prohibition of use of force. State practice shows that different factors are often argued to be justified exceptions, such as self-defence, the victim state’s consent, humanitarian intervention, reprisals, and the protection of nationals abroad. However, some of these are controversial, and the right to self-defence is the only ground clearly accepted as legal authority besides UN enforcement measures. There are examples of episodes where the Security Council has authorized the use of force, even though the criteria for self-defence were present. In connection with actual situations, I will discuss the boundaries between the right to self-defence and UN collective security measures under Chapter VII of the Charter, see below chapter 4.

¹ Brownlie (1963) page 364.

² Brownlie (1998) page 198.

³ E.g. Brownlie (1963) page 361 ff., Shaw (1997) page 782 ff.

⁴ *Nicaragua* case (Merits) *ICJ Reports* 1986 page 14.

The UN Charter is not the legal authority of the right of self-defence. Instead, the Charter affirms that such a right exists. Article 51 states that

“Nothing in this present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”

The right of self-defence has been invoked in almost every episode involving the use of force since the drafting of the United Nations. This includes situations where it has not been evident that the use of force could be justified on this ground.⁵

1.4 Structure

Chapter 2 provides an overview of the competence of the Security Council with main focus on its powers under Chapter VII of the UN Charter. This will include the legal limits for when the Council can authorize the use of force.

The third chapter of this thesis relates to the interpretation of Security Council resolutions. I will here discuss general rules of interpretation, and their application to Council resolutions.

Chapter 4 of the thesis is concerned with actual situations where force has been, or at least has been claimed, to be authorized. In this chapter I will discuss how Security Council resolutions are applied in actual situations to legalize the use of force.

⁵ E.g. the right to anticipatory self-defence.

2 Powers of the Security Council

2.1 Introduction

The Security Council is granted the “primary responsibility for the maintenance of international peace and security”, pursuant to Article 24. The term “international peace”, and threats to and breaches of it, is not defined in the Charter,⁶ and it is also difficult to find a general and precise definition of this elsewhere. One possible negative definition of the minimum content of international peace is that it includes the absence of inter-state use of force.⁷ However, the practice of the Council indicates that it adopts a broader approach, see below.

Although the “primary responsibility” is vested in the Security Council, the powers concerning these issues do not appear to be exclusive. There are examples of incidents where the General Assembly has considered itself competent on these matters,⁸ although western states have made it clear that they do not regard General Assembly resolutions as authoritative determinations under Chapter VII. The Council has also delegated its powers to other organs on several occasions.⁹ In the *Certain Expenses* case the International Court of Justice stated that the Security Council had only primary, not exclusive authority under Article 24 of the Charter, although “it is only the Security Council which can require enforcement by coercive action against an aggressor”.¹⁰ Nevertheless, the Court stated that the Charter “makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security”. In the *Nicaragua* case the Court followed up its view that the Council does not have exclusive responsibility for international peace and security, and the Court made clear it does not regard itself as excluded from deciding on cases involving ongoing armed conflicts.¹¹ Nevertheless, the Security Council is the main organ when it comes to these issues.

⁶ The *travaux préparatoires* indicates that this was done deliberately.

⁷ Schweigman (2001) pages 34-35.

⁸ E.g. GA/Res. 0377 (A), 3 Nov. 1950 (Uniting for Peace Resolution).

⁹ Sarooshi (1999).

¹⁰ *Certain Expenses* case, *ICJ reports 1962* page 151.

¹¹ *Nicaragua* case (Jurisdiction and Admissability), *ICJ Reports 1984* page 392.

Decisions of the Security Council in accordance with the UN Charter are binding upon all Member States pursuant to Article 25. According to Article 103, this has the consequence that a Council resolution will prevail in the event of a conflict with obligations Members may have under other agreements. Hence, a Council resolution may impose exceptions from treaties, i.e. oblige States to act contrary to international agreements by which they are bound.

International law and the use of force is an area where political considerations often seem to be more important than what is legally justifiable in every situation. There appears to have been a belief in a universal World Order with a common cause, under which international rules of law will be set out.¹² However, this view has not taken the diverse backgrounds, both political and judicial, into consideration. The vagueness that characterizes the language of international law allows different understandings and contradictory interpretations, as it is difficult to define exactly what is legally prohibited or allowed. Since much of the application of international law takes place on the political arena, it often seems like separating law and politics is more illusory than real. Koskenniemi argue that it is impossible to discern legal from political evaluations.¹³ Many of the subjects of international law are political organs, and the means to obtain a political goal do not necessarily correspond with the provisions provided for in international law. It is therefore difficult to define the legal matter of a dispute and the wanted political outcome.

2.2 The UN Charter Chapter VII

Chapter VII of the UN Charter contains provisions concerning “Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression”. When the Security Council has determined the existence of one of these situations under Article 39, it can decide provisional measures under Article 40. Pursuant to Article 41, the Council can decide what measures “not involving the use of armed force” to be applied in order to “give effect to its decisions”. If such measures under Article 41 prove to be inadequate

¹² Aristodemou (1994) page 549 ff.

¹³ Koskenniemi (1990).

or the Council consider them to be so, it may take actions involving the use of armed force. Article 42 of the Charter states that the Council “may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security”. So far, measures not involving armed force has initially been applied in every situation where force has finally been authorized by the Council.

When the UN Charter was adopted, the intentions were that a UN military force should be established, and that this should fulfil the task whenever the Security Council authorized the use of force. According to Article 43 of the Charter, Member States of the United Nations should make special agreements with the organization to contribute to such armed forces. Yet, the provision in this article has never been brought into effect. When the Security Council authorized force in the Korean conflict in 1950, it was discussed what the legal basis of these actions were. Some even claimed that the Council could not authorize enforcement actions pursuant to Article 42 as long as Article 43 remained inoperative, see below 4.2. Today, however, practice shows the lack of Article 43 agreements has not prevented the Council from considering itself competent to authorize force.

As I will discuss below, it is not always apparent if the Council has intended to authorize measures involving the use of force, or if it has considered measures under Article 41 to be adequate. One of the reasons for this is that the Council usually does not mention the specific articles in its resolutions, but simply says that it is acting under Chapter VII of the Charter.

2.3 Article 39 – determination

It is unclear what the exact criteria in each of the conditions under Article 39 are, and what the differences between them consist of. Article 39 states that the Security Council “shall determine” the existence of one of the three situations, i.e. threat to the peace, breach of the peace or act of aggression. The fact that the Council itself determines when these conditions have been met means that it has a wide discretion on this issue. The Council’s application of its competence is influenced by political considerations, and practice has shown that what is held to fall under each of the conditions depend

upon the circumstances of the case. Due to possibility of veto pursuant to Article 27(3), it will also depend upon the current relationship between the five permanent members of the Council. This is illustrated by the difficulties in reaching agreements within the Security Council during the Cold War, and such problems increased with the controversy of the issue. Hence, what is determined to constitute the existence of one of the three conditions in one situation may be considered as a fulfilment of one of the others in another case. As regards the legal limits of the Council's powers, see below 2.4.

2.3.1 "Breach of the peace"

Together with acts of aggression, breaches of the peace are the core of Chapter VII of the Charter. Fulfilment of this condition has been found by the Security Council in situations where one state has taken some sort of action involving the use of force against another state. This category is more neutral than the "act of aggression", but there is no strict line between these categories. There have been incidents where the Council has turned to this category, although it is clear that the criteria to state that an act of aggression has taken place are fulfilled. For example, in Resolution 660 the Council determined that the Iraqi invasion of Kuwait was a breach of the peace,¹⁴ see below.

2.3.2 "Act of aggression"

The content of the condition "act of aggression" has been highly controversial, and a definition was finally agreed upon by the General Assembly in 1974 by the adoption of Resolution 3314.¹⁵ Article 1 states that aggression is the use of armed force by a state "against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations".

Furthermore, Article 2 of the resolution says that "the first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression".

¹⁴ S/Res. 660, 2 Aug. 1990.

¹⁵ GA/Res. 3314 (XXIX), 14 Dec. 1974.

As mentioned above, the Security Council has been reluctant to determine the existence of an act of aggression, and instead turned to “breach of the peace”. This happened in Resolution 660, which regards the Iraqi invasion of Kuwait. Harris notes that it is “clear that Iraq had committed large scale armed aggression without the legal justification”.¹⁶ The Council has determined acts of aggression only three times. This was in relation to Israel,¹⁷ South Africa¹⁸ and Southern Rhodesia.¹⁹

2.3.3 “Threat to the peace”

This is the broadest of the three categories, and it is difficult to find a precise definition. Shaw notes that “in a sense it constitutes a safety net for the Security Council where the conditions needed for a breach of the peace or act of aggressions do not appear to be present”.²⁰ Practice since the Kuwait crisis in 1990 has shown that the range of situations the Council has determined to constitute threats to international peace and security has broadened. Hence, several of these situations fall outside the traditional understanding of threats to international peace and security. Malanczuk claims that “a threat to the peace seems to be whatever the Security Council says is a threat to the peace”.²¹ It is apparent that political implications have motivated Member States to turn to this condition on occasions where one of the other conditions has been fulfilled. This is perhaps due to the harm a determination of one of the other conditions could do to the relations between the Member States of the Security Council and the aggressor state.

In the following I will look into some of the situations where the Council has determined that there has been a threat to the peace.

¹⁶ Harris (1998) page 956. “Invasion” is the principal type of armed aggression listed in the General Assembly’s Definition of Aggression, see article 3 a). Annexation by force is declared to be unlawful in the General Assembly’s 1970 Declaration on Principles of International Law.

¹⁷ S/Res. 573, 4 Oct. 1985.

¹⁸ S/Res. 387, 31 Mar. 1976.

¹⁹ S/Res. 455, 23 Nov. 1979.

²⁰ Shaw (1998) page 855.

²¹ Malanczuk (1997) page 426.

Terrorism

The Security Council has determined that certain acts of terrorism have constituted threats to the peace.

The case concerning Libya and the *Lockerbie* incident started with the explosion of a Pan Am aeroplane over Scotland on 21 December 1988. The US and British governments then indicted two Libyan nationals for the act, and issued a joint declaration insisting, *inter alia*, that Libya surrendered the accused for trial. The Libyan government was not willing to extradite its nationals, but offered to solve the dispute by other means, which was not accepted by the UK and the US. In Resolution 731²² the Security Council did not act under Chapter VII, but still urged Libya to comply with the extradition requests made by the US and the UK. As this did not happen, the Council adopted Resolution 748.²³ In this resolution, acting under Chapter VII of the Charter, the Council determined that the Libyan government's failure to comply with the requests of Resolution 731 showed that they did not demonstrate concrete actions of Libya's renunciation of terrorism, which constituted a threat to international peace and security. This was also repeated in Resolution 883.²⁴

Although the Council argued that this was a part of their elimination of international terrorism process, it is still unclear how a refusal to extradite certain people for an incident that happened four years ago can constitute a threat to the peace, as long as Libya was willing to solve the dispute by other means.

In Resolutions 1368²⁵ and 1373,²⁶ adopted after the September 11 terrorist attacks in the United States, the Security Council stated that "such acts, like any act of international terrorism, constitute a threat to international peace and security".

²² S/Res. 731, 21 Jan. 1992.

²³ S/Res. 748, 31 Mar. 1992.

²⁴ S/Res. 883, 11 Nov. 1993.

²⁵ S/Res. 1368, 12 Sep. 2001.

²⁶ S/Res. 1373, 28 Sep. 2001.

Human rights

The first time the Security Council established a direct connection between its role as responsible for the maintenance of international peace and security and violation of human rights was in Resolution 688.²⁷ Here, the Council determined that the Iraqi regime's suppression of the Kurdish population in Northern Iraq constituted a "threat to international peace and security".

Throughout 1992 and 1993 Somalia was stricken by famine and many people were fleeing their homes due to years of civil war. This situation eventually led to the Security Council's adoption of Resolution 733,²⁸ in which the Council expressed its concern that "the continuation of this situation constitutes, as stated in the report of the Secretary-General, a threat to international peace and security". The following resolutions continued this vague determination, until Resolution 794 finally said that the situation in Somalia "constitutes a threat to international peace and security in the region".²⁹

Later, the Council has used the same argumentation concerning the interventions in Haiti (1994) and Kosovo (1999).

Not every violation can be said to constitute a threat to international peace and security. Although the Council has determined that breaches of human rights obligations can fulfil the condition in Article 39, these have been grave and flagrant violations of the most fundamental human rights. Practice shows that the Council has determined genocide as a circumstance applicable under Article 39.

Democracy

It may be read into the Security Council resolutions concerning Haiti in 1993-1996 that the Council considered attacks against the democracy in a state as an Article 39 situation, although it did not explicitly state this. In December 1990 Jean-Bertrand

²⁷ S/Res. 688, 5 Apr. 1991. Thune, Barth Eide and Ulfstein (2003) page 2.

²⁸ S/Res. 733, 23 Jan. 1991.

²⁹ S/Res. 794, 3 Dec. 1992.

Aristide was elected president in the first democratic election in Haiti in decades. On 30 September 1991 the Haitian Army staged a *coup d'état*, which eventually caused many refugees fleeing the country. This led to the unanimous adoption of Resolution 841 in June 1993, in which the Council determined that the continuation of the situation in Haiti threatened international peace and security in the region.³⁰

Weapons of mass destruction

Similar to human rights, the Council has seemed willing to determine that certain states' having weapons of mass destruction are threats to the peace. It is a difficult question, as there are many states that possess weapons of mass destruction, such as nuclear weapons. In its advisory opinion in the *Legality of threat or use of nuclear weapons* case, the International Court of Justice did not determine whether or not having nuclear weapons would be unlawful in every circumstance.³¹ It is likely that a line must be drawn between states that have weapons of mass destruction that seem to have an intention of using them, and states that do not have this intention. In Resolution 1441 the Security Council established a direct connection between weapons of mass destruction and threats to international peace and security.³² In this resolution, the Council recognised "the threat Iraq's non-compliance with Council resolutions and proliferation of weapons of mass destruction and long-range missiles poses to international peace and security".

2.4 Legal limits to the powers of the Security Council

There appears to be few legal limits to the Security Council's powers on issues concerning international peace and security. However, the drafting process of the UN Charter indicates that the powers of the Council were not intended to be unlimited, and that such limits must be read into the Charter.

There are two types of legal limits to the powers of the Security Council. First, there is the UN Charter Article 24(2), which specifically states that the Council shall "act in

³⁰ S/Res. 841, 16 Jun. 1993.

³¹ *Legality of the threat or use of nuclear weapons case*, ICJ Reports 1996 page 226.

³² S/Res. 1441, 8 Nov. 2002.

accordance with the Purposes and Principles of the Charter of the United Nations”. This also applies to the Council’s discharge of its duties under Chapter VII. The purposes and principles referred to are listed in Articles 1 and 2. Secondly, there are the limits in the specific provisions regulating the Council’s powers.

The question whether the Security Council is bound by general international law in discharging its powers under Chapter VII has been widely discussed. It is possible to argue in conformity with the wording of Charter Article 1(1) that the Council’s obligation to act in accordance with general principles of international law only applies to situations regarding settlement of disputes under Chapter VI of the Charter. This will not be contrary to a strict reading of the wording of the provision. However, the view that the Council is completely unbound by international law with respect to measures concerning international peace and security is probably too far-fetched. There is no specific provision in which the Council is given a right to derogate from international law. Furthermore, the existence of norms of *jus cogens* imposes obligations on the Security Council.³³ Hence, it can be assumed that general international law limits the powers of the Council.

Principles of equal rights and self-determination of peoples are other purposes of the UN, pursuant to Article 1(2). According to Article 2(1), the Council must also respect human rights and the principle of sovereign equalities.

There is often made a distinction with regard to the Council’s powers concerning the determination under Article 39 and the other provisions of Chapter VII. It has been asserted that the determination under Article 39 of the Charter is a political question, which can not be regulated by legal standards.³⁴ The Council is given the discretion to determine whether one of three situations is existent, and this will mainly be based upon factual matters. However, the “act of aggression” is somewhat different than the conditions threats to or breaches of the peace. According to the 1970 General Assembly Resolution 3314 aggression has been recognised as a crime against peace, which leads

³³ Akande (1997).

³⁴ E.g. Judge Lauterpacht in the *Bosnia Genocide Convention* case, *ICJ Reports 1993* page 325 at 439.

to state responsibility.³⁵ Consequently, the determination of acts of aggression will have legal implications, and the determination of this question will be subject to legal limits.³⁶ It has also been argued that this applies to the other two conditions.³⁷ This is the view supported by most commentators, who contend that although the Council is given a wide margin of discretion, its powers under Article 39 are nevertheless limited by the principles and purposes of the Charter. The fact that the purposes and principles are relatively vague may, however, have the consequence that the limits *de facto* will not be significant.

Article 42 seems to be the provision of Chapter VII that most clearly expresses legal limits to the Council's powers. This provision gives the Security Council the authority to take action involving the use of force "as may be necessary to maintain or restore international peace and security". Unlike Article 41, which states that the Council can decide provisional measures "as it deems necessary", the wording of Article 42 does not seem to leave this question entirely up to the Council's discretion. The "necessary" requirement indicates that the Council must consider what would be a proportionate measure in relation to what in each situation has constituted one of the conditions of Article 39.

3 The interpretation of Security Council resolutions

3.1 Introduction

Although issues regarding interpretation of certain Security Council resolutions have been frequently discussed, it is difficult to find specific general rules of interpretation. There is no treaty concerning this, neither has much been written about such general rules. Furthermore, the International Court of Justice has seldom explained its approach

³⁵ The Council's determination of an act of aggression will have implications in terms of state responsibility for international wrongful acts and international crime.

³⁶ Akande (1997) page 339.

³⁷ E.g. two dissenting Judges Gros and Fitzmaurice in the *Namibia* Advisory Opinion.

to interpretation. The interpretation of Council resolutions is of particular significance with reference to situations concerning the use of force. This is an issue where consensus among states has been difficult to reach, and it has grave consequences for the states involved and others affected by it.

Once it has been determined that there is an authorization to use force, the next question is how should this authorization be interpreted. It is natural to seek an answer to this question by looking at the objects and purposes for why the authorization to use force was given. An authorization to use force in a Security Council resolution can have many different objectives which are provided for in the resolution itself. However, these are not necessarily written in clear terms. The purpose of an authorization, and the wording in which this is presented, may have significance for how the authorization is carried out. In this context, the same applies as to when the authorization is given. Vague, ambiguous language will give Member States the ability to justify actions that were not originally intended when the resolution was adopted. This has influenced the way the Council has formulated the objects of the resolution. In the first resolutions in which the Council authorized the use of force, the Member States were given broad authority to carry out the mandate. The consequences of this were that the Member States interpreted this widely, and probably went beyond what the Council originally intended. We have seen that subsequent resolutions have been more specific in what the objectives of the resolution have been.

3.2 The special character of Security Council resolutions

The Security Council itself is not a judicial, but rather a political organ. And although some of its functions may seem similar to that of a legislature, it is misleading to suggest that the Council acts as such.³⁸ Instead, the Council is an executive organ that in particular situations or in connection with certain disputes imposes obligations on third parties or authorizes action by third parties that might otherwise be unlawful, e.g. to use force against another state. The resolutions represent the principal form in which the Security Council acts, and the Council adopts a large number of resolutions each year.

³⁸ Wood (1998) page 77.

While some of these are just meant as recommendations, others impose obligations on states, and are therefore binding upon the Member States of the United Nations in accordance with Article 25 of the Charter.

As similarities between treaties and contracts make it relevant to apply some of the general principles concerning the interpretation of contracts on treaties as well, these arguments do not apply to the same extent with respect to resolutions. While treaties are contractually agreed, resolutions are unilaterally adopted, and unlike the situation with treaties, there are no parties to a resolution. At the same time, rules concerning the interpretation of treaties are one of few guidelines regarding interpretation of documents concerning international relations. And despite all the differences, there are in fact certain resemblances between resolutions and treaties that make it reasonable to apply some of the same principles, such as that they are both binding upon states and that they seek to regulate the behaviour of states.

Another particular circumstance that applies to Security Council resolutions is that their ambiguity is often deliberate. I will discuss this below.

3.3 Authorities

As mentioned above there are few authoritative guides concerning the rules of interpretation of resolutions, but what is acknowledged as the principal judicial authority on this issue is the passage in the *Namibia* Advisory Opinion.³⁹

“The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.”

³⁹*Namibia* Advisory Opinion,, *ICJ Reports 1971* page 16 at 53.

In this case the International Court of Justice was to interpret a Security Council resolution in order to determine, *inter alia*, whether a particular resolution had binding effect. Even though the Court did not specifically mention the Vienna Convention in this passage, it is evident that its approach is somewhat similar to the provisions codified in Article 31(1) of the convention.⁴⁰ The Court stated that one must look at the wording and the context of the resolution. It specifically mentioned the discussions leading to it and the Charter provisions invoked, but also stated that “all the circumstances that might assist in determining the legal consequences of the resolution” are relevant in this context. This has resemblance with Article 31 of the Vienna Convention concerning general rules of interpretation. Paragraph 1 of the article states that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

3.4 The wording of the resolution – interpretive approach

The wording of a resolution expresses what the drafters explicitly have agreed upon and is the most important manifestation of the Security Council’s intentions behind a resolution. When the language is clear, the interpretation will cause few problems. Yet, this is only a starting point due to the fact that language in a Security Council resolution tends to be unclear. The circumstances of the adoption of a resolution frequently make it difficult for the Member States to agree upon how the wording in a resolution should be. The result is that the final draft often is a compromise, which is ambiguous and vague in its language. Therefore, just reading the words may not be of much help. This is exemplified by the Iraq resolutions, and the question as to what exactly they have authorized.

Another issue that makes it difficult to determine the correct interpretation of a resolution are different approaches on how to interpret the words. The factors that are considered relevant when interpreting something depend on which interpretive approach is chosen. There are mainly two types of interpretive approaches, one textually-oriented and one purposive approach.

⁴⁰ Wood (1998) page 75 ff., and Byers (2002) page 23 ff.

Farer has called the former the “classical view”. This type of approach concentrates upon the textual meaning of the document, and presumes that the parties to a treaty “had an original intention which can be discovered primarily through textual analysis and which, in the absence of some unforeseen change in circumstances, must be respected until the agreement has expired according to terms or been replaced by mutual consent”.⁴¹ The head of the United States delegation at the 1968-1969 Vienna Conference on the Law of Treaties, Myres McDougal, proposed a purposive approach. However, this was opposed by the great majority of the votes in favour of the textually-oriented approach set out in the Vienna Convention on the Law of Treaties Articles 31 and 33. Although the United States in 1973 acknowledged these provisions of the treaty as codifications of customary international law, we have seen recent examples of US officials and US authors arguing in favour of the purposively-oriented approach to interpret treaties as well as Security Council resolutions.

The purposive approach is by Farer called “legal realism”. This way of interpreting focuses on finding the purpose of what is to be interpreted, not only by looking at the text, but by also according considerable weight to other circumstances.

It may appear difficult to see exactly which interpretive approach the International Court of Justice took in the *Namibia* Advisory Opinion, and whether this corresponds with the Vienna Convention Article 31(1). Wood argues that “it might be thought that the Court’s remarks in *Namibia* tend more towards the policy-oriented approach of McDougal and others than that of the Vienna Convention”.⁴² As the Vienna Convention specifically mentions that a treaty shall be interpreted in accordance with “the ordinary meaning” of terms, this may lead to the assumption that this is a textually-oriented approach. At the same time, the Vienna Convention specifically states that it is the meaning of the terms “in their context” and “in the light of its object and purpose”. In my opinion this does not seem much different than the circumstances mentioned by the Court in *Namibia*. In the event that the meaning of a treaty still appears ambiguous after

⁴¹ Farer (1991) page 186.

⁴² Wood (1998) page 75.

the interpretation in accordance with Article 31 of the Convention, Article 32 provides for supplementary means of interpretation. This article specifically mention “the preparatory work of the treaty” and the “circumstances of its conclusion”. This does not seem to differ significantly from the circumstances mentioned by the Court in *Namibia*.

3.5 Means of interpretation

Below, I will discuss what I consider to be the most important means of interpretation, i.e. factors to be taken into account in order to determine the meaning of a resolution. I will use the principles from the Vienna Convention on the Law of Treaties as guidelines in addition to those of the *Namibia* Advisory Opinion. In order for the resolution to have the intended effect, it is necessary to interpret its terms in accordance with its object and purpose.

Context

The Vienna Convention Article 31(1) states that treaties shall be interpreted in their context. This shall comprise its text, preamble and annexes. The equivalent context of a Security Council resolution will be its text. Statements by the President of the Council will also have practical significance. Such statements or letters from the President of the Council may contain an interpretation of a resolution. The preamble of a resolution will often include its object and purpose. However, one must use this text with caution. The preamble of a Council resolution tends to contain elements that states could not agree upon to be included in the operative paragraphs of the resolution.⁴³ Thus, according to much weight to the preamble may lead to unwanted consequences.

The previous discussion and preparatory work

The discussion leading to the resolution is one of the circumstances that is specifically mentioned by the Court in the *Namibia* Advisory Opinion. Such discussions may help clarify the intentions behind the words of the resolution. Since the finally adopted draft often is a compromise, the prior discussion may illustrate around what the disagreements revolved, and what the Council meant to authorize. The discussion

⁴³ Wood (1998) pages 86-87.

leading to the resolution has often been emphasized by states that disagree with the interpretation of a resolution.

In a meeting prior to the adoption of Resolution 1154,⁴⁴ concerning the situation in Iraq, none of the Member States asserted that they intended to authorize the unilateral use of force. On the contrary, a majority stated that additional Council authorization would be required before force could be used.⁴⁵ This has later been used as an argument against the legality of the subsequent military attack on Iraq.

The problems regarding the previous discussion as a mean of interpretation, is that it is sometimes difficult to know what exactly this discussion consisted of. There is no standard procedure for drafting Security Council resolutions, and much of the preparatory work is done informally. The resolutions are often drafted by non-lawyers under considerable political pressure, with the aim to secure unanimity within the Council.⁴⁶ Thus, the previous discussion and other preparatory work may not provide a clear answer as to the intentions behind a resolution.

UN Charter provisions

When examining the wording, the context and the previous discussion still leave the intentions behind a resolution unclear, it is natural to turn to the UN Charter, under which the Council's authority is founded. This circumstance is also specifically mentioned by the Court in the *Namibia* case. The Charter provision invoked in a certain case may help illustrate the objects and purpose of the resolution. For example, when a victim state invokes the right of self-defence, this may have significance when one shall determine whether or not the Council meant to authorize force in a resolution.

The purposes and principles of the Charter itself may also function as guidelines. Two of the main objectives of the UN Charter are to limit the use of force, and for states to settle their disputes by peaceful means. The right of self-determination of peoples,

⁴⁴ S/Res. 1154, 2 Mar. 1998.

⁴⁵ Lobel and Ratner (1999) page 124.

⁴⁶ Wood (1998) page 80 ff.

and the respect of human rights and sovereign equality are other important principles. When interpreting a Council resolution, one should bear in mind that the Council's legal powers are limited by the principles and purposes of the Charter. Furthermore, resolutions are tools that the Council apply in order to implement these purposes.

The provisions of Chapter VII of the Charter also function as important guidelines. The fact that the Security Council is granted the responsibility and the power to take action sets important limitations on the interpretation of a Council resolution. When the language is unclear, an interpretation that results in the transmission of considerable power from the Council to Member States must be viewed with caution.

Article 42 of the Charter contains the provisions under which the Council can authorize force. This provision states that the Council can "take such action ... as may be necessary to maintain or restore international peace and security". The term "necessary" is important in relation to the interpretation of an authorization of force. A broad interpretation, exceeding the original purposes of the resolution under which the authorization is given, may be contrary to what was necessary. Arguably, what is considered necessary may change as situations evolve. However, a resolution needs to be interpreted in accordance with the Council's presumed intentions at the time of the adoption. An interpretation that changes with the situation may cause a deprivation of the Council's powers.

Previous resolutions

The language and the interpretation of previous resolutions may have significance in order to determine the meaning of terms in a resolution. Certain expressions may serve as clear evidence of a specific meaning, despite the ambiguity, for example the expression "use all necessary means". Today it is clear that this is an authorization of the use of force.

3.6 Competence to interpret Security Council decisions

It is an important question who can determine the correct interpretation of a Security Council resolution. Such resolutions are interpreted and applied by several different bodies, such as the Council itself, subsidiary organs, other organizations, state officials,

and different scholars. There have been several occasions where substantial disagreements on how to interpret a resolution have occurred. On some occasions the dissents have arisen around minor details, while at other times, the arguments have been about whether or not a resolution authorized the use of force. This is connected with the ambiguity that often dominates the language in Council resolutions, not least in situations concerning Article 42.

Regarding the authentic interpretation of a Security Council resolution, i.e. interpretation in accordance with the intended meaning of the drafters, only the Council itself, or some body it has authorized to do so, may give this in a true sense.⁴⁷ The Permanent Court stated in the *Jaworzina* Advisory Opinion, “it is an established principle that the right of giving an authoritative interpretation of a legal rule (*le droit d’interpréter authentiquement*) belongs solely to the body who has the power to modify or suppress it”.⁴⁸ It is unlikely that an authentic interpretation needs to take the same form as the provision that is subject of the interpretation. Wood argues that “there seems no reason why an authentic interpretation of a mandatory Chapter VII provision need necessarily itself take the form of a mandatory Chapter VII provision”.⁴⁹ Consequently, such authentic interpretations may be in a subsequent resolution or in some other way, such as a Presidential statement or a letter from the President, as are acknowledged to express consensus within the Council. However, Presidential statements and other statements that do not take the form of a decision will not legally have a binding effect upon states pursuant to Article 25. Nevertheless, practically they will be important factors when one shall determine the intentions behind a resolution.

Even after this principle, it is not necessarily much easier to find a correct interpretation of a resolution. There are several examples of situations where the Security Council has adopted a resolution after disagreements about the content of the resolution. Subsequent to the adoption, the Member States of the Council have seemed willing to interpret the same resolution in contrary ways. Hence, it will also in many instances be impossible

⁴⁷ Wood (1998) page 82.

⁴⁸ *Jaworzina* Advisory Opinion of 6 December 1923, *PCIJ Series B*, No. 8, 37.

⁴⁹ Wood (1998) page 84.

for the Council to come up with an authentic interpretation. Consequently, UN Member States may seek an answer to the interpretation of a Security Council resolution elsewhere. The most important organ in this context is the International Court of Justice, which is the main judicial organ of the United Nations.

The International Court of Justice will be able to review decisions of the Security Council in two different ways, i.e. advisory opinions or contentious cases. Advisory opinions may be requested by the General Assembly or the Security Council on “any legal question” pursuant to the Charter Article 96(1). According to Article 96(2), advisory opinions may also be requested by other UN organs or specialised agencies, authorized by the General Assembly, on legal questions “within the scope of their activities”. However, advisory opinions will not have a binding effect. Secondly, one Member State can present the issue to the Court for a binding decision, provided that the Court has jurisdiction in that particular case, see the Statute of the Court Article 36.⁵⁰

Although an advisory opinion from the International Court of Justice is not legally binding, it will still have an important practical function. This interpretation will often be the only stated interpretation from a UN organ. Hence, states will be reluctant to act contradictory to an advisory opinion from the Court. The fact that the Court may give a binding decision on the matter between two state parties on the same issue has the possibility of influencing states to comply with the interpretation given by the Court. UN organs will also be reluctant to oppose an advisory opinion from the International Court. Its status as the principal judicial organ of the UN, and the fact that a UN organ chooses to submit the matter to the Court, will have the consequence that the Court’s opinion in most cases will be respected and complied with.

⁵⁰ Statute of the International Court of Justice of 26 June 1945.

4 Authorizations to use force – actual situations

4.1 Introduction

In this chapter I will discuss actual situations where states have used armed force in connection with Security Council resolutions. What must first be determined is whether the Council has authorized the use of force in a particular situation. The Security Council has been reluctant to use the term “force” in its resolutions, and has instead turned to other expressions. This has led certain states to claim that the use of force has been authorized impliedly, also in situations where the legal basis of this has seemed dubious.

The fact that the provisions in Article 43 has never been carried out still has some significance regarding authorizations to use force. Since there are no UN forces, authorizations must be given to Member States or regional organizations. Furthermore, the Council can not demand a state’s contribution to military operations.⁵¹ However, an authorization to use force will be binding on third states. Although Member States are not bound to contribute to the execution of the authorization, they will be bound by its effect. There are also examples of situations where the Council has authorized peacekeeping forces to use force. As enforcement measures require large resources, it is frequently powerful states that are willing to contribute to such actions. Hence, there will be a risk that powerful states use UN authorizations to serve their own national interests. Practice shows that the US often has been involved when the use of force has been authorized, but that their willingness to contribute has depended on the interests they have in the particular state involved in the conflict. Hence, conflicts in African states, such as Somalia, have been of less importance to them.

I have chosen to primarily focus on three situations, namely Korea, Iraq and Kosovo. In my view, these situations illustrate the main legal questions regarding international law and the use of force authorized by the Security Council. When an authorization of force was given regarding the situation in Korea in 1950, it was the first time the Council applied this authority. Principles of this situation have functioned as a precedent for the

⁵¹ Schachter *Authorized Uses of Force by the United Nations and Regional Organizations* (1991) page 69.

Council's powers pursuant to Chapter VII of the Charter. The first time force was authorized subsequent to the end of the Cold War was in Iraq in 1990. The authorization provided has been of significant importance in international law, and this is also the precedent for the wording of a resolution authorizing force. It is not entirely correct to suggest that there was only one situation regarding Iraq and an authorization of force. Since the mandate to use force was given in 1990, the use of force has been resorted to against this country on several occasions. Accordingly, the Iraq situations are suited to illustrate the difficulties concerning an authorization and its validity. When NATO intervened in Kosovo in 1999, it was without a clear authorization from the Council. This situation illustrates how Member States of the United Nations try to justify their actions based on authorization from the Council, and how the Council's subsequent approval of an action may seem to legalize it. Finally, I will briefly discuss other situations that illustrate how the use of force has been authorized or claimed to be authorized.

4.2 Korea

The Security Council threatened to use Chapter VII on several occasions during the Cold War. However, as the veto pursuant to Article 27(3) was used 279 times between 1945 and 1985, the Council rarely succeeded in taking binding decisions in response to threats to the peace, breaches of the peace or acts of aggression. The inactivity by the Security Council was just as much caused by threats to use veto as the actual veto.⁵² The only time during this period the Council was enabled to authorize the use of force in response to a breach of the peace was in Korea in 1950.

Background

On 25 June 1950, South Korea was invaded by North Korean forces. This led to the adoption of Resolution 82⁵³ by the Security Council the same day, which determined that the armed attack on the Republic of Korea constituted a breach of the peace. It called for North Korea's immediate cessation of hostilities and the withdrawal of their

⁵² Gray (2000) page 145.

⁵³ S/Res. 82, 25 Jun. 1950.

armed forces. Resolution 83⁵⁴ was passed as a response to North Korea's failure to comply with the demands of Resolution 82. Here, the Council recommended that "the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security". The adoption of this resolution was enabled by the USSR's absence in protest to the representation of China in the United Nations by the Taiwan government. The resolution was passed by 7 votes to 1 (Yugoslavia), as two members did not participate in the voting (Egypt and India).

Resolution 84⁵⁵ was adopted on 7 July 1950. In this resolution the Security Council once again recommended the Member States to provide military force and other assistance, and to make this available to a "unified command under the United States of America".⁵⁶ The Council then requested the US to "designate the commander of such forces". What was most remarkable about this resolution and what separates it from all subsequent resolutions, is that it did not only explicitly authorize the use of force; this resolution even authorized the unified command to act under the United Nations flag.⁵⁷

Legal issues

As the situation with other Security Council resolutions, the language in Resolutions 83 and 84 is vague, and the resolutions do not specifically mention the articles of the Charter the Council is acting under. This has led to speculation about the legal basis of the actions in Korea. I will here discuss the legal problems that have arisen regarding this.

Prior to the adoption of the resolutions, the United States seemed to seek Security Council authorization for exercising the right of collective self-defence. Legally, such an authorization would not be required pursuant to Article 51 of the Charter. This provision states that the right of self-defence is an "inherent right". Although an

⁵⁴ S/Res. 83, 27 Jun. 1950.

⁵⁵ S/Res. 84, 7 Jul. 1950.

⁵⁶ S/Res. 84, para. 3.

⁵⁷ S/Res. 84, para. 5.

authorization to repel the armed attack does not have direct legal effect, it may serve to show the Council's approval of the exercise of this right in a certain situation. This will have significance in the event that the criteria for the right of self-defence in a particular situation are questionable. The Security Council determined in Resolutions 82, 83 and 84 that the invasion of South Korea by North Korean forces constituted an armed attack, and consequently stated that the condition to exercise the right to self-defence pursuant to Article 51 of the Charter was fulfilled. Yet, nowhere in the resolutions from 1950 did the Council explicitly mention the right of collective self-defence without Council authorization. However, Resolution 83 recommended member to "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack", which clearly describes the content of the right of self-defence. The fact that the Council determined that there had been an armed attack also distinguishes this from a typical Article 39 situation. An armed attack is a grave violation of the prohibition of force pursuant to Article 2(4), and will exceed what is required to determine a breach of, or threat to, the peace, or act of aggression. This is illustrated by the fact that there has to exist an armed attack to lawfully resort to the use of force without prior Council authorization. The expression "repel the armed attack" in itself does not authorize a broader use of force than what is provided for under the right of self-defence. Sarooshi argue that an authorization of collective self-defence will only occur when the Council expressly states that it is limiting its authorization to such measures. As this was not the case in Korea, he considers the authorization as enforcement actions.⁵⁸ Many scholars have contended that the use of force in Korea must be seen as collective self-defence, and that Security Council authorization was not necessary in this conflict. When the US-led forces first intervened in the conflict, their aim was to repel the armed attack. Brownlie notes that: "It is probable that the coalition which went to the assistance of South Korea in 1950 acted, at least initially, by virtue of Article 51."⁵⁹ The United States apparently upheld this view several days after the resolution was adopted, as US Secretary of State Acheson stated that US actions taken pursuant to the Security Council resolution were "solely for the purpose of restoring the Republic of Korea to its status

⁵⁸ Sarooshi (1999) page 170.

⁵⁹ Brownlie (1998) page 199.

prior to the invasion from the north and of re-establishing the peace broken by that invasion”.⁶⁰

In addition to the authorization to repel the armed attack, the Council also authorized the Member States to “to restore international peace and security in the area”. The resolution itself does not specify what is meant by this, nor does the Council’s discussion provide much evidence. Lobel and Ratner note that this type of language “could mean virtually anything, depending on how one defines ‘peace and security’ and ‘area’”.⁶¹ To restore peace and security is the Security Council’s main responsibility pursuant to Article 24 of the Charter. However, the Charter does not contain a specific definition of this. It is also difficult to know what was meant by the term “area”. Does it only include peace and security within the territory of South Korea, or did the authorization also apply to North Korea?

The scope of the authorization of Resolution 83 was discussed after the successful enforcement actions in Korea. This led to a wish among the US-led forces to expand the authorization to pursue the retreating North Koreans into the North and seek their total destruction. The question then arose as to whether such action was authorized by Resolution 83 or if it required new UN authorization. Although President Truman initially appeared to believe a UN decision was necessary, the US Department of State shortly thereafter asserted that Resolution 83 provided the sufficient authorization.⁶² This led to disagreement among UN members. Although there was considerable opposition, as India and several other members argued that further specific authorization was legally required, the majority of UN members did not oppose the US position. The US denied that an additional authorization was necessary as military operations required broad and flexible legal authority to deal with changing situations. Nevertheless, the United States eventually submitted the issue to the General Assembly, and obtained additional authorization. Textually, the expression “restore international peace and security in the area” has very few limits, and the US position may be justified by an

⁶⁰ Lobel and Ratner (1999) page 138.

⁶¹ Lobel and Ratner (1999) page 126.

⁶² Lobel and Ratner (1999) page 138.

isolated reading of this expression. However, the purpose of Resolution 83 was the withdrawal of North Korean armed forces from South Korea and the cessation of hostilities. A wide interpretation of “restore international peace and security in the area” will therefore exceed the objective of the resolution. Nonetheless, it is unclear whether the US actions would have been contrary to Resolution 83.

The next question is what was the legal basis for the Council authorization.

The wording of Resolutions 83 and 84 is characterized by the lack of agreements provided for in Article 43 of the UN Charter. The Korea resolutions did not establish a UN force, although Weston notes that “the Security Council attempted at least the pretense of fielding a unified command under the UN flag”.⁶³ Some have argued that the action could not have been authorized by the Security Council under Article 42, because that provision is not autonomous but depends on member states having made agreements under Article 43.⁶⁴ This has been opposed by others who argue that there is no indication in the Charter that Article 42 must remain inoperative in the absence of Article 43 agreements. Furthermore, the wording in Article 42 makes no reference to Article 43.⁶⁵ This view has been supported by the International Court of Justice in the *Certain Expenses* case. Although there are still a few scholars who argue the mandatory connection between Articles 42 and 43, there seems to be broad consensus today that the Security Council has the power to authorize enforcement measures. Some scholars contend that since Article 42 allows Security Council decisions to use force, this must be taken to include the lesser power to make recommendations to member states.⁶⁶

The absence of a UN army under Article 43 led the Council to recommend enforcement actions by member states instead of issuing a binding decision. The fact that the authorizations in Resolutions 83 and 84 are recommendations has led some scholars to argue that the actions were based on the Council’s right to make recommendations to

⁶³ Weston (1991) page 522.

⁶⁴ Weston (1991) page 519.

⁶⁵ Sarooshi (1999) page 143 ff.

⁶⁶ Gray (2000) page 148.

maintain and restore international peace and security in Article 39 of the Charter.⁶⁷

Weston notes: “Yet this was scarcely the kind of recommendation the Charter drafters had in mind when they adopted Article 39. Article 39 *recommendations* were understood to refer to chapter VI provisions calling for the *peaceful* settlement of international disputes, to be pursued either alone or in tandem with economic and/or military *decisions* taken in accordance with Article 41 and 42.”⁶⁸ Some commentators have claimed that the Korean action was pursuant to the Council’s primary responsibility for international peace and security, and that the legal basis was Chapter VII generally.

The intervention in Korea was strongly criticized, especially by the USSR, because of UN’s involvement in this type of conflict. First of all, they claimed that the United Nations had no jurisdiction over the North Korean government. Neither South Korea nor North Korea was members of the UN at the time. The USSR also criticized the UN intervention in a conflict it considered to be a struggle within one divided state for decolonisation, rather than an inter-state conflict where one state was invaded by another. The supporters of this view argue that the UN and its members do not have the right to intervene in an ordinary civil war. This argument has been countered by other states, since the members of the United Nations had been treating the Republic of Korea as an established state for a long time.

The fact that the resolution concerning Korea was adopted without a permanent member’s concurring vote was also used as an argument by the USSR of evidence that the resolution was unlawful. However, this view did not gain much support, and today it is uncontested that an abstention from a permanent member does not prevent a resolution from getting adopted by the Security Council.

Concluding remarks

The authorization to use force in Korea was the most comprehensive and most important during the Cold War. This situation illustrates how the Council for the first

⁶⁷ E.g. Weston (1991) page 521.

⁶⁸ Weston *ibid*.

time applied its powers under Chapter VII despite the lack of Article 43 agreements. The failure of the Council to specify the exact article under which it was acting, and the armed attack prior to the actions, has led to disagreements on how to understand the Council's role in this situation. Today, no single answer is generally accepted as to the legal basis of this situation.

Regarding the objective of the authorization of force, it is unfortunate that a resolution contains such broad language that may be interpreted in a number of ways. Nonetheless, I have concluded that the Member States in this situation acted in compliance with the authorization, although more specific wording would be preferable in order to strengthen the legal clarity.

4.3 Iraq

Iraq and the use of force has been one of the most important issues regarding the UN collective security system since the first authorization to use force against the country in 1990. I will here focus on two situations which are closely connected to one another. These are the Persian Gulf War in 1991 and the invasion of Iraq by US-led coalition forces in 2003.

1990

Background

Kuwait gained full independence from Britain in 1961. Soon thereafter, Iraq claimed to be entitled to the entire territory of Kuwait. This view was upheld until October 1963, when a new government in Baghdad recognized Kuwait as an independent state. After the 1980-88 war between Iran and Iraq, differences between Kuwait and Iraq arose. By July 1990, discussions between the governments broke down, and Iraqi troop movements were observed along the border.⁶⁹

On 2 August 1990, Iraqi troops started an invasion and subsequent annexation of Kuwait. Resolution 660 was adopted by the Security Council the same day, determining that Iraq's invasion of Kuwait constituted a "breach of international peace and security",

⁶⁹ Kaikobad (1993) page 302.

and demanding Iraq's immediate withdrawal. In this resolution, the Council specifically stated that it was acting under Articles 39 and 40 of the UN Charter.

Four days later, the Security Council passed Resolution 661.⁷⁰ Here, the Council determined that Iraq had failed to comply with Resolution 660. It then specifically affirmed "the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter". Acting under Chapter VII of the Charter, the Council imposed different embargoes and other measures to "secure compliance of Iraq with paragraph 2 of Resolution 660...and to restore the authority of the legitimate government of Kuwait".

By the end of August, the Council found that Iraqi vessels were still being used to export oil. This led to the adoption of Resolution 665, where the Council called upon "Member States co-operating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority to halt all inward and outward maritime shipping".⁷¹ This resolution was understood to authorize the use of force, but only for the purpose of enforcing the embargo.⁷²

The Security Council passed Resolution 678 on 28 November 1990.⁷³ In this resolution, acting under Chapter VII of the Charter, Iraq was given a last chance until January 15, 1991 to comply with the previous resolutions. If Iraq failed to do so, the Council authorized Member States co-operating with the Government of Kuwait "to use all necessary means to uphold and implement Security Council Resolution 660 and all subsequent relevant resolutions and to restore international peace and security in the area".⁷⁴

⁷⁰ S/Res. 661, 6 Aug. 1990.

⁷¹ S/Res. 665, 25 Aug. 1990.

⁷² Chayes (1991) page 5.

⁷³ S/Res. 678, 28 Nov. 1990.

⁷⁴ S/Res. 678 para. 2.

On 17 January 1991 coalition forces led by the US initiated *Operation Desert Storm*, and what is now known as the Persian Gulf War started.

Legal issues

The Iraq-Kuwait crisis had resemblances with Korea in 1950, as there had been an armed attack in both situations. Unlike the resolutions concerning Korea, the Security Council even affirmed the right of both individual and collective self-defence in Resolution 661. It was therefore quite remarkable that the Council only determined that there had been a breach of the peace, and not an act of aggression, see above 2.3.2. In the *Nicaragua* case, the International Court of Justice stated that to exercise collective self-defence, there must be a request for assistance from the victim state. This was, however, not a problem in this case, since Kuwait had already requested such assistance. Provided that the criteria of necessity and proportionality were fulfilled, it therefore seems clear that the coalition forces could have acted in compliance with the right of self-defence, which was asserted by the US and the UK.⁷⁵

Despite the specific affirmation of the right of collective self-defence, the Council nonetheless authorized force in Resolution 678. During the discussions prior to the adoption of this resolution, some of the states wanted the language of the resolution to expressly state that the use of force was authorized, and some of the early drafts of the resolution also contained the term “force”. However, due to objections by the USSR, this wording of the resolution was impossible to get adopted, and the term was replaced by the more neutral expression “use all necessary means”.⁷⁶ Nonetheless, it was clear that this was an authorization of force.

Subsequent to the adoption, discussions about the legal significance of this resolution arose. Kaikobad emphasizes five facts that are relevant to the legal nature of Resolution 678.⁷⁷ First, the Council did not specify the precise article under which it was acting when the use of force was authorized. Secondly, the Council did not confirm that it had

⁷⁵ Schachter *United Nations Law in the Gulf Conflict* (1991) page 457 ff.

⁷⁶ Lobel and Ratner (1999) page 129.

⁷⁷ Kaikobad (1993) page 353.

determined the existence of a threat to the peace, breach of the peace or act of aggression as required under Article 39. Thirdly, the Council failed to clarify that the economic sanctions adopted by it were, or had proved to be, inadequate. Fourthly, the Council failed to employ terminology which adequately reflected the precise legal status of paragraph 2, namely whether or not it constituted a recommendation pursuant to Article 39 or a decision under Article 42. Finally, in paragraph 4, the States “co-operating with the Government of Kuwait” were requested “to keep the Security Council regularly informed on the progress of actions undertaken pursuant to paragraphs 2 and 3 of the present resolutions...”. Kaikobad notes that “Not only did this effectively preclude the Council from playing a preponderant role in the conduct of operations as envisaged by the Charter, but it also barred a token UN presence in the form of a UN commander or the use of a UN flag”.

The arguments put forward were to some extent similar to those concerning Korea. While some claimed that Resolution 678 only implemented the right of self-defence,⁷⁸ and that it did not have any other significance than to show the Council’s support of this, others argued that the resolution had to be seen as an independent authorization to use force. Some commentators contended that because Article 43 agreements had never been carried out, the Council could not impose a mandatory decision regarding this, and consequently that the authorization could not have been pursuant to Article 42.⁷⁹ Others have argued that Article 42 was the legal basis of these actions.⁸⁰ This is the only provision of the Charter that explicitly states that the Council has the right to “take action” involving the use of force. Kirgis argues that the Council’s power to authorize force under Chapter VII may be seen as an implied power that is not literally tied to Article 42, but consistent with the purpose of that article.⁸¹ It may lead to an unreasonable result if the lack of Article 43 agreements would necessarily mean that the Council is precluded from exercising its responsibility for the maintenance of international peace and security. The fact that there is no UN force means that the

⁷⁸ E.g. Rostow (1991) and Schachter *United Nations Law in the Gulf Conflict* (1991).

⁷⁹ E.g. Freudenschuß (1994) page 524.

⁸⁰ E.g. Warbrick (1991).

⁸¹ Kirgis (1995) page 521.

Council can not require states to contribute troops whenever it has authorized force. This has the effect that the question as to whether the Council, in situations regarding an authorization to use force, has taken a non-binding recommendation or a decision is of no legal consequence as regards the states carrying out the mandate.⁸² Nevertheless, the important point is that the Council once again considered itself competent to authorize the use of force.

42 days after the initiation of the Gulf War, a formal ceasefire was reached in April 1991. The Security Council imposed a ceasefire agreement on Iraq in Resolution 687 of 3 April 1991,⁸³ in which Iraq had to accept a number of obligations and demands. The ceasefire agreement would formally be effective between Iraq, Kuwait and the other Member States of the United Nations from the moment Iraq accepted the terms of this resolution. This happened in a letter of 6 April to the UN from the Iraqi foreign minister.⁸⁴

2002

Background

One of the conditions in Resolution 687 was that Iraq should destroy its weapons of mass destruction and accept weapons inspections by the UN and the International Atomic Energy Agency (IAEA). Throughout the years subsequent to the ceasefire, difficulties in connection with Iraq's cooperation with the weapons inspectors gradually arose. This led the US in the beginning of 1998 to threaten to use military force unless Iraq complied. In March 1998, the Security Council passed Resolution 1154, which stated that that Iraq's lack of compliance with its obligations would have the "severest consequences". As a consequence of continuing problems concerning Iraq's cooperation, the head of the UN weapons inspectors (UNSCOM), Richard Butler, declared on 15 December 1998 that they were unable to fulfil their tasks. The next day,

⁸² Sarooshi (1999) page 149.

⁸³ S/Res. 687, 3 Apr. 1991.

⁸⁴ S/22456, 6 April 1991, see Thune, Barth Eide and Ulfstein (2003) page 8.

the US and the UK initiated *Operation Desert Fox*, which was a massive attack on Iraq.⁸⁵

These actions were not immediately followed by new inspections. This did not happen until 2002, when the Council passed Resolution 1441. In this resolution the Council determined that Iraq had failed to comply with its obligations, which constituted a material breach. However, Iraq was given a “final opportunity” to comply with its obligations. This was an approach somewhat similar to Resolution 1154. In Resolution 1441, the Council determined that Iraq’s continued breach of its obligations would have “serious consequences”.

Throughout December 2002 and January and February 2003, the head of the UN weapons inspectors (UNMOVIC),⁸⁶ Hans Blix, concluded that there were certain difficulties regarding Iraq’s cooperation. However, he asserted Iraq had initiated measures “indicative of a more active attitude”. The US and the UK (supported by Spain) proposed a draft to a new resolution, in which it would be determined that Iraq had failed to comply with its final opportunity to comply with its obligations. Due to objections by other members of the Council, it became clear that the resolution would not get the necessary support, thus it was never officially voted over. At that time, the US and the UK had seemed willing to use force without another resolution for a significant period of time. In a speech on 17 March 2003, President George W. Bush stated that Saddam Hussein and his sons had 48 hours to leave the country in order to avoid a military action. As they did not do so, US-led coalition forces initiated an invasion of Iraq on March 20.

Legal issues

In both 1998 and 2003, some of the same legal basis for the actions was invoked by the US and the UK. The main claim asserted by these states was that the use of force was impliedly authorized by the Security Council. In addition, the US argued that the 2003 invasion could also be justified as pre-emptive self-defence. Due to the subject of this

⁸⁵ Ulfstein (forthcoming) chapter 2.

⁸⁶ UNMOVIC was UNSCOM’s successor.

thesis, I will only discuss the arguments asserted with regard to authorization by the Security Council.

In his speech 17 March 2003, President Bush claimed that Resolutions 678 and 687 were still applicable. A similar argumentation was applied by the UK in a letter to the President of the Security Council of 20 March 2003.⁸⁷ The British Attorney General, Lord Goldsmith asserted that a right to use force existed from the combined effect of Resolutions 678, 687 and 1441.⁸⁸ In his Parliamentary Answer, he claimed that “Resolution 687 suspended but did not terminate the authority to use force under resolution 678”. Furthermore, he argued that a material breach of Resolution 687 “revives the authority to use force under resolution 678”. He then concluded that Iraq’s failure to comply with its final opportunity, given in Resolution 1441, constituted a further material breach of Resolution 687. Consequently, the authorization to use force under Resolution 678 was revived.

The question whether the authorization to use force was revived by a “material breach” of Iraq’s commitments is controversial. This issue raises three main questions; first, whether there had been a material breach which terminated the ceasefire-agreement. Secondly, whether there was a standing authorization of force to be revived. Thirdly, provided that there was an authorization to be revived, was the authorization applicable in this situation?

In Resolution 1441 did the Security Council determine that Iraq “has been and remains in material breach of its obligations under relevant resolutions, including resolution 687”. However, the Council gave Iraq a “final opportunity to comply with its disarmament obligations”. In paragraph 4 of Resolution 1441 did the Council state that “false statements or omissions...shall constitute a further material breach of Iraq’s obligations”. The question is therefore whether Iraq has fulfilled its obligations under this final opportunity or not.

⁸⁷ S/2003/350, 21 Mar. 2003, see Ulfstein (forthcoming) chapter 3.

⁸⁸ Parliamentary Answer On The Legal Basis For The Use Of Force Against Iraq, 17 March 2003.

Prior to the coalition forces' invasion of Iraq in March 2003, there was no determination by the Council that Iraq had not complied with its final opportunity. On the contrary, the Council was not able to agree upon such a statement, although a draft resolution proposed by the US and the UK was discussed. Resolution 1441 did not expressly state who could make this determination. The US asserted that whether there had been a material breach was an objective fact, which did not require a Council determination.⁸⁹ Certain scholars have also claimed that a further Council decision was not required, based on the wording of Resolution 1441.⁹⁰ Yoo argues that the US and the other members of the coalition in the Gulf war are in fact parties to the ceasefire agreement, and that they therefore unilaterally can suspend its operation.⁹¹ This view is contrary to what has been asserted by others. Franck argues that it is the Security Council and the UN that are parties to the ceasefire agreement, and that they are the ones "entitled in law to determine whether Iraq is complying with its commitments to the Council".⁹² This view is also taken by Ulfstein, who claims that based on the fact that the ceasefire agreement is between Iraq and the UN, the Member States could not invoke the principle in Article 60 of the Vienna Convention on the Law of Treaties as legal basis that a material breach of a treaty entitles a party to suspend the operation of the treaty.⁹³ Moreover, Franck emphasizes: "Neither the text nor the debates on the adoption of Resolution 687 reveal the slightest indication that the Council intended to empower any of its members, by themselves, to determine that Iraq was in material breach." As long as the Council does not expressly delegate its powers under Chapter VII to Member States, these powers will remain with the Council itself, as in this situation. This is supported by the wording of both Resolution 1441, which stated that the Council decided "to remain seized of the matter", and Resolution 687, in which the Council was "to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area".

⁸⁹ Taft and Buchwald (2003) page 560.

⁹⁰ Taft and Buchwald *ibid.* Woo (2003) page 571.

⁹¹ Yoo (2003) page 568-569.

⁹² Franck (2003) page 612.

⁹³ Ulfstein (forthcoming) chapter 4.3.

The issue whether the authorization given in Resolution 678 could be revived, raises questions as to how long a Council resolution is valid. Yoo claims that an authorization to use force remains until the Security Council explicitly terminates it. He contends: “Unless the Security Council had clearly stated, using the same language that it has in the past, that it has terminated Resolution 678’s authorization for the use of force, any such authorization continued.”⁹⁴ Due to the fact that such temporally limiting resolutions have proved difficult to get adopted, it has been asserted that there are other ways to determine how long an authorization is valid in addition to temporally limited resolutions. One possible method is to decide the validity of the authorization in accordance with the determination under Article 39 of the Charter. Consequently, the authorization will expire when there does no longer exist a threat to the peace, breach of the peace or act of aggression. However, this will lead to difficult questions in controversial situations as to how to determine this, and who can determine it. Other, more practical solutions are permanent ceasefires and other definitive ends to hostilities. The most important question in this respect is whether a permanent ceasefire terminates or just suspends an authorization to use force. Furthermore, can this authorization be revived by the contractees unilaterally, or is it required that this is done by the Security Council? The answers to this changed with the UN Charter. In pre-Charter law a party to a ceasefire was permitted to treat its serious violation as a material breach, and entitled it to resume fighting. Lobel and Ratner argue that “Post-Charter law holds that UN-imposed ceasefires reaffirm the basic obligation of states to refrain from using force”.⁹⁵ They say that “strong policy interests make it advisable that Security Council authorizations to use force be terminated by the establishment of a ceasefire unless explicitly and unambiguously continued by the Council itself”.⁹⁶ In my opinion it is reasonable that the UN Charter made a change in this issue. The purpose of the Charter was to limit the use of force, and the prohibition of force in Article 2(4) is now acknowledged as a principle of *jus cogens*. Hence, exceptions must be well founded. One of the main objectives by the UN was to settle disputes by peaceful means. A permanent ceasefire must as a general principle be seen as such a settlement. Since the

⁹⁴ Yoo (2003) page 567-568.

⁹⁵ Lobel and Ratner (1999) page 144.

⁹⁶ Lobel and Ratner (1999) pages 144-145.

Security Council is granted the primary responsibility for international peace and security, it must be this body that can decide when the use of force can be resumed, not the states given the authority.

It is clear from the wording of Resolution 687 that it provided for a permanent and not just a temporary ceasefire. In paragraph 1, the Council expressly stated that a formal ceasefire is one of the goals of the resolution. Furthermore, the Council asserted in paragraph 6 that the Member States cooperating with Kuwait in accordance with Resolution 678 would “bring their military presence to an end”. The question is therefore whether the Security Council in Resolution 687 preserved the authorization. Resolution 678 does not contain a provision similar to that of Resolution 686,⁹⁷ which was the first resolution adopted by the Security Council after the cessation of hostilities. This resolution is often referred to as a provisional ceasefire,⁹⁸ although it was a one-sided resolution which only demanded Iraq to cease hostilities.⁹⁹ In Resolution 686, the authorization to use force of Resolution 678 was expressly preserved. Paragraph 4 recognizes that “the provisions of paragraph 2 of resolution 678 (1990) remain valid”. Furthermore, the Council affirmed in paragraph 1 of Resolution 686 that “all twelve resolutions noted above continue to have full force and effect”. The fact that Resolution 687 lacks a provision similar to that of Resolution 686, the question arises as to whether the authorization can be impliedly preserved. Lowe contends “there is no known doctrine of the revival of authorisations in Security Council resolution, on which some implied revival could be based”.¹⁰⁰ In paragraph 34 of Resolution 687 did the Security Council decide “to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area”. Based on the wording of this paragraph it seems like the Council subsequent to the ceasefire agreement will remain in power to decide what future measures to be taken. This is especially underlined by the specific expression that it is

⁹⁷ S/Res. 686, 2 Mar. 1991.

⁹⁸ Lobel and Ratner (1999) page 148.

⁹⁹ Gray (1994) page 138.

¹⁰⁰ Lowe (2003) page 865.

the Council that will take “such further steps” for the implementation of the conditions of the resolution.

There have been discussions as to the scope of the authorization given in Resolution 678. The authorization to use all necessary means was given to Member States co-operating with the Government of Kuwait“ to “uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.” Hence, the authorization was not given to Member States in general. An interpretation in conformity with the wording of this provision suggests that the authorization can not be carried out when the Member is no longer cooperating with the Kuwaiti government. At the time of the 2003 invasion, the Member States contributing to the coalition forces could hardly be said to fulfil this condition.

The ambiguous phrase “all subsequent relevant resolutions” is one of the provisions of Resolution 678 that has been most controversial as regards the scope of the authorization given in Resolution 678. The difficulty is regarding whether this meant all resolutions from Resolution 660 until the resolution in which the authorization was given, or every subsequent resolution concerning Iraq, including resolutions not yet adopted. The wording of Resolution 678 does not provide an answer, since both interpretations are in accordance with the expression. Obviously, the US and the UK relied on the latter alternative, as do certain scholars.¹⁰¹ This has been strongly criticized by commentators who claim that this will lead to an unreasonable result.¹⁰² If there is a standing authorization to use force against Iraq to implement all resolutions adopted concerning the country in all future, the Council powers regarding Iraq will be permanently delegated to Member States. This will be contrary to the UN Charter Chapter VII, under which the *Security Council* is granted the tasks concerning peace and security. An authorization this broad will transfer the Council’s responsibility pursuant to the Charter to Member States. This will have the consequence that Member States are granted power contrary to the Charter. A standing authorization to use force against Iraq will also undermine Iraq’s rights as a sovereign state. Arguably, Article

¹⁰¹ Wedgwood (2003) page 579.

¹⁰² E.g. Thune, Barth Eide and Ulfstein (2003) page 22.

2(7) of the Charter does not preclude the application of UN enforcement measures under Chapter VII. Nevertheless, a standing authorization, in which the Security Council would not have any influence, would probably be contrary to the spirit of Article 2(7). Ulfstein also notes that Resolution 678 does not contain a specific provision about a “material breach” of the subsequent resolutions.¹⁰³ Consequently, in my view the expression “all subsequent relevant resolutions” meant all resolutions until Resolution 678.

The primary objective of the authorization of force given in Resolution 678 was cessation of hostilities and Iraq’s withdrawal from Kuwait. However, the expression “to restore international peace and security in the area” may, as mentioned in connection with Korea, be interpreted to include practically everything. The invasion of Iraq in March 2003 was due to claims of Iraq’s failure to comply with its commitments regarding weapons of mass destruction pursuant to Resolution 687. It has been argued that this is one of the reasons why the authorization is applicable on enforcement of Iraq’s disarmament obligations. This has been opposed for example Franck, who notes that “this does not connote some expansive further mandate for contingent action against Iraq at the discretion of any individual member of the coalition of the willing”.¹⁰⁴ Read in connection with the provision of the resolution which states that the authorization is given to “Member States co-operating with the Government of Kuwait”, implies that the mandate had to be carried out in accordance with the purpose of liberating Kuwait. Hence, Iraq’s obligations regarding weapons of mass destruction falls outside the scope of the resolution.

Concluding remarks

The Iraq situations are probably the most important authorizations of force in a legal context. The situations illustrate the difficulties concerning the adoption of a resolution, and how different states have interests contrary to one another. This is another example of the Council’s failure to specify which article it is acting under when it authorized the use of force.

¹⁰³ Ulfstein (forthcoming) chapter 4.4.

¹⁰⁴ Franck (2003) page 612.

The authorization to use force given in Resolution 678 has been interpreted in a number of ways. The interpretation of this resolution also has validity for which actions are considered lawful, and which has been claimed to be unauthorized. An interpretation of Resolution 678 that allows for the use of force because of Iraq's failure to comply with Resolution 1441 exceeds the right to use force in accordance with the right of self-defence. Hence, this will mean that Resolution 678 does more than just implementing what was permitted under the right of self-defence. On the contrary, it is an independent authorization for the use of force. This will have significance regarding the determination of the legality of the actions in 1998 and 2003.

The implicit authorization to use force in Resolution 678, based on the vague formulation "use all necessary means", has become a precedent for subsequent resolutions. This expression and similar varieties of the expression has later been used when the Council has explicitly authorized the use of force.

4.4 Kosovo

Background

The province of Kosovo gained autonomy within the state of Serbia in 1946. In 1989, this autonomous state was revoked by Belgrade, and President Slobodan Milosevic asserted that the Serb minority in Kosovo was at risk. Subsequently, Kosovo Albanians were discriminated in a number of fields, and tension between the two ethnic groups intensified during the 1990s. In 1998 the Kosovo Liberation Army started an armed struggle for independence from the Federal Republic of Yugoslavia (FRY). Yugoslav forces responded by large-scale military assaults.¹⁰⁵

The Security Council adopted Resolution 1160 on 31 March 1998.¹⁰⁶ In this resolution, acting under Chapter VII of the Charter, the Council called for a political solution and imposed an arms embargo on FRY, including Kosovo. Throughout the subsequent days,

¹⁰⁵ Wedgewood (1999) pages 828 -829.

¹⁰⁶ S/Res. 1160, 31 Mar. 1998.

the situation deteriorated rapidly. Violence intensified and caused the displacement of more than two hundred thousand Kosovo Albanians. In June 1998 the UN Secretary-General advised NATO of the necessity for a Security Council mandate for any military intervention in the Federal Republic of Yugoslavia.¹⁰⁷ By that time it was already clear that such an authorization would be opposed by at least Russia and China.

Resolution 1199 was passed on 23 September 1998, in which the Security Council affirmed that the deterioration of the situation in Kosovo “constitutes a threat to peace and security in the region”.¹⁰⁸ The resolution called for immediate ceasefire, but it did not say anything about the consequences if the Serbs failed to comply. This deliberate ambiguity enabled Russia to support the resolution.¹⁰⁹ Like the situation when Resolution 1160 was passed, China abstained from voting, due to its belief that the Kosovo crisis was an internal matter for Yugoslavia, pursuant to the Charter Article 2(7).

The Security Council adopted Resolution 1203 on 24 October 1998.¹¹⁰ This resolution was passed by 13-0-2, as Russia as well as China abstained from voting. Here, the Council affirmed that the unresolved situation in Kosovo constituted a continuing threat to peace and security in the region, and it was this characterization of the situation that was unacceptable to China and Russia.

Even before Resolution 1199 was adopted, the US asserted that NATO already had the authority to send in a military force in Kosovo. Moreover, NATO did not seek explicit authorization from the Security Council before the alliance on 24 March 1999 initiated a comprehensive bombing campaign against the FRY.¹¹¹ The operation lasted for 78 days, when Belgrade signed the agreement on the autonomy of Kosovo and an international military presence in Kosovo.¹¹²

¹⁰⁷ Simma (1999) page 6.

¹⁰⁸ S/Res. 1199, 23 Sep. 1998.

¹⁰⁹ Crossette (1998).

¹¹⁰ S/Res. 1203, 24 Oct. 1998.

¹¹¹ Rytter (2001) page 121.

¹¹² Rytter (2001) page 152.

Subsequent to the initiation of the bombing there were efforts in the Security Council to pass a resolution condemning the NATO action as unlawful. On 14 April 1999 the Security Council rejected by twelve votes to three a draft resolution provided by Russia (together with India and Belarus), condemning the NATO operation as a violation of Article 2(4) of the UN Charter and demanding its termination.

After the bombing ended, the Security Council passed Resolution 1244 on 10 June 1999.¹¹³ Acting under Chapter VII of the Charter, the Council required the withdrawal of all Yugoslav military, police and paramilitary forces from Kosovo. It then authorized Member States and relevant international organizations to establish the international security presence...with all necessary means to fulfil its responsibilities”, and created a UN civil administration to develop “provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections”.

Legal issues

The legality of NATO’s air campaign in Kosovo has been frequently discussed, and there seems to be a number of different opinions on whether or not the actions were lawful under international law. The legality of the military intervention in Kosovo has mainly been claimed on three different grounds.

The first is unauthorized humanitarian intervention, the second is implied authorization by the Security Council, and the third is that the operation was legalized by the Security Council *ex post facto*.

Unauthorized humanitarian intervention has been claimed lawful on two different grounds. Some states and scholars who advocate this view claim that there is a doctrine of unauthorized humanitarian intervention, and that this type of actions is not illegal under the UN Charter. Others argue that unauthorized humanitarian intervention will not be legal unless in exceptional situations where there is no other solution. I will not

¹¹³ S/Res. 1244, 10 Jun. 1999.

discuss the legality of NATO's intervention in Kosovo on these grounds, as this falls beyond the subject of this thesis.

The first question is therefore if the armed intervention in Kosovo was impliedly authorized by the Security Council.

Although the wording of Resolutions 1160, 1199 and 1203 neither expressly nor impliedly amounted to the use of force, some of the NATO states relied on implied authorization as part of the justification for the operation in Kosovo. US officials have argued that the mere invocation of Chapter VII with regard to the Kosovo situation is sufficient to authorize a resort to force.¹¹⁴ This view has been opposed by most other states and scholars who have not been willing to accept a doctrine of implied authorization.¹¹⁵ When the wording of a resolution does not authorize force, and it is clear from the prior Council discussions that such authorization was not meant to be given, I find it unreasonable if the Member States of the United Nations themselves can establish such an implied authorization. Acceptance of implied authorizations in situations like these may involve a risk of depriving the Security Council its authority to authorize the use of force. This is not in accordance with the UN Charter.

The second question is if the Security Council's actions subsequent to the conclusion of NATO's operation constitute legalization *ex post facto* of the armed intervention.

It has been argued that the Security Council has approved the NATO operation in Kosovo for several reasons. First of all, the Security Council has never condemned the action. The Council held an urgent meeting to discuss the situation the same day NATO commenced its air raids. Although several states asserted that NATO's action was a violation of the UN Charter, most other non-NATO members recognised the moral legitimacy of the action.¹¹⁶ It appears that political reasons prevented the Council from

¹¹⁴ Lobel and Ratner (1999) page 125.

¹¹⁵ E.g. Lobel and Ratner (1999).

¹¹⁶ Rytter (2001) page 155.

condemning the action as unlawful, even though many states regretted the resort to unauthorized use of force.

As I have discussed above, a failure to condemn actions containing uses of force is not sufficient to conclude lawfulness of such actions. Instead, the view that has gained broader support is the consequences of the adoption of Resolution 1244, in which the Council endorsed the NATO operation. This issue can both be seen as a question of *ex post facto* legalization and *ex post facto* legitimisation of actions that would otherwise be unlawful.

There seems to be broad consensus among states and scholars that Resolution 1244 has an important effect on the legitimacy of NATO's operation. One important point is the lack of denunciation of NATO's actions in Kosovo. Cassese notes that Resolution 1244: "contains no criticism, not even implicitly, of the NATO use of force – unless of course one considers that an implied reservation may be found in the first preambular paragraph of the resolution, which stated that the Security Council has 'the primary responsibility...for the maintenance of international peace and security'".¹¹⁷ Simma, before the adoption of Resolution 1244, concluded that NATO's intervention in Kosovo was in breach of international law.¹¹⁸ Yet, he claimed that only "a thin red line separates NATO's action on Kosovo from international legality". Cassese, also prior to Resolution 1244, concluded that NATO's intervention was legitimate, but unlawful.¹¹⁹

At the same time the Security Council makes no direct statement in Resolution 1244 that NATO's intervention was lawful. In the preamble of this resolution, the Council welcomes the political solution, enforced by NATO. This may be seen as an endorsement of an agreement obtained through the threat or use of force contrary to Article 52 of the 1969 Vienna Convention on the Law of Treaties, or to legitimize

¹¹⁷ Cassese *A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessatis* (1999) page 792.

¹¹⁸ Simma (1999).

¹¹⁹ Cassese *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?* (1999).

action contrary to a norm of *jus cogens*.¹²⁰ The text of Resolution 1244 does not mention NATO, but simply authorizes “Member States and relevant international organizations to establish the international security presence in Kosovo...with all necessary means to fulfil its responsibilities”. This has been claimed to be an attempt to conceal the NATO-led peacekeeping force beneath a UN cover story.¹²¹

Regarding the argument of retroactively legalizing the NATO intervention by Resolution 1244, Gowlland-Debbas notes: “the Council’s clear reaffirmation of the principle of territorial integrity in Resolution 1244 brings us back to the prohibition laid down in Article 2 (4) of the Charter and can with difficulty be seen as a waiver either under this Article or *a fortiori* under Article 53 of the Charter”. She also emphasizes that none of the Council debates surrounding the adoption of the resolution gives any indication that it was to be seen as an endorsement of the NATO military operation. She comments: “It can therefore be argued that the Council, by means of Resolution 1244, simply makes its own the principles contained in an agreement concluded outside its framework, without any attempt at legitimisation of the threat and use of force behind it”. Instead, Resolution 1244 may be seen as an approval of the political solution in Kosovo, but not of the actions coercing it.¹²² Although Henkin concludes that unilateral humanitarian intervention in every circumstance should be unlawful, he still seems to consider Resolution 1244 as at least a legitimisation of NATO’s operation. He notes: “For Kosovo, Council ratification after the fact in Resolution 1244 – formal ratification by an affirmative vote of the Council – effectively ratified what earlier might have constituted unilateral action questionable as a matter of law.”¹²³ Nonetheless, Henkin’s use of the term “ratification” may be a way to avoid saying that the actions were legalized. Pellet notes that: “At the end of the day legality meets legitimacy”, and therefore concludes that NATO’s intervention in Serbia was legalized *ex post facto*.¹²⁴

¹²⁰ Gowlland-Debbas (2000) page 376.

¹²¹ Falk (1999) page 851.

¹²² Gowlland-Debbas (2000) page 375 ff.

¹²³ Henkin (1999) page 827.

¹²⁴ Pellet (2000) page 389.

It is difficult to separate what is legitimised and what is legalized, based on the Council's reluctance of stating its exact intentions in the resolution. One important question is whether or not the Council can be seen to approve consequences of an action, without endorsing the action itself at the same time. The fact that the Council is a political organ may have significance in this respect. Political considerations may preclude the Council from condemning actions that may be unlawful under international law, or even approving consequences of unlawful actions. Nevertheless, drawing the conclusion that the Council necessarily legalizes every action in situations like this seems to be beyond the Council's intentions and the purposes of the UN Charter.

Concluding remarks

The Kosovo situation illustrates how disagreements within the Security Council lead certain states to use force without a prior explicit authorization. Today, I believe that most commentators consider this situation as humanitarian intervention. This situation is an example of how Member States seek to justify their uses of force as authorized by the Council, although they show willingness to take action without such authorization.

4.5 Other situations

Since the Iraq-Kuwait crisis in 1990, the Security Council has explicitly authorized Member States to use force in Bosnia, Somalia, Rwanda, Haiti, Albania and East-Timor.

The failure of the Security Council to pass resolutions explicitly authorizing force, and the ambiguous language, has led states to claim implicit authorizations to use force on some occasions. In certain situations states have argued that the Council impliedly has authorized the use of force before the actions are initiated. Other times, it has been asserted that the uses of force have been retroactively approved by legalization *ex post facto*. In the following I will discuss some of the situations where uses of force has been claimed to be authorized by the Security Council.

Israeli air strike against nuclear reactor in Iraq 1981

This situation is the most doubtful implicit authorization that has been claimed, and most writers agree that the Security Council can not be seen as authorizing this action.

In 1981 Israel launched an air strike against the Osiraq nuclear reactor in Iraq, claiming to be acting in anticipatory self-defence. Israel argued that the nuclear reactor would be used to make nuclear weapons, which Iraq would use to attack Israel, and that the air strike must be justified on this legal ground. In this case, the Security Council “strongly condemned” the air strike.¹²⁵ Nevertheless, D’Amato claims that this action must be seen as implicitly approved by the Security Council. He argues that the condemnation was pro forma because it did not contain any penalty or sanctions against Israel. He says that “it is often politically expedient for the community to condemn a forceful initiative in explicit terms, yet to approve of it in fact by stopping short of reprisals against the initiator”.¹²⁶

This argumentation is strongly criticized by Lobel and Ratner. They claim that this is taking the US argument to the extreme, and that “to take the additional step and to argue that explicit disapproval constitutes implied consent renders the concept of authorization indeterminate and highly speculative”.¹²⁷ The difficulty with accepting D’Amato’s argumentation is the possibility of imposing an opinion on the Security Council that was not originally there. The same way as a resolution authorizing the use of force can be vetoed, so can a resolution imposing sanctions on the state that has used of force. This is the so-called reversed veto. The way I see it, accepting a condemnation as an implicit authorization due to the lack of sanctions, will undermine the role of the Security Council. It is likely that this will cause certain Member States of the Council to be reluctant to impose sanctions on a state, although it has used unauthorized force. If this shall be seen as an authorization, it will no longer be the Council that authorizes enforcement measures, but the one state that avoids having sanctions adopted against it.

ECOWAS’ intervention in Liberia 1990

This appears to be the situation when the Security Council’s implicit authorization has been least contested. In 1990 there was a great risk of a civil war erupting in Liberia,

¹²⁵ S/Res. 487, 19 Jun. 1981.

¹²⁶ D’Amato (1983) page 586.

¹²⁷ Lobel and Ratner (1999) page 124.

and in August the same year, forces from the five members states of ECOWAS intervened in Liberia to prevent this. These actions were taken without prior Security Council authorization, but the Council seemed to tacitly accept and express praise for the intervention five months after it was initiated. First, the Council commended the efforts made by ECOWAS a Presidential Statement, before the Council adopted Resolution 788, in which it “commended ECOWAS for its efforts to restore peace, security and stability” in Liberia.¹²⁸ Gowlland-Debbas argues that resolution did not necessarily legitimise the action taken. She notes that “it is not clear, for example, whether the Security Council was endorsing ECOWAS’s diplomatic efforts or military intervention.”¹²⁹ It is true that the Council’s failure to specify what it endorsed, may lead us to draw a conclusion further than intended. Nevertheless, in this case, ECOWAS’s armed intervention was an important part of its actions, and it is difficult to separate these from the diplomatic actions. Neither has the Council ever expressed any sort of condemnation of the intervention. Based on all these circumstances, I do not find it unreasonable to conclude that the Council in this situation legitimised the actions taken by ECOWAS.

5 Concluding remarks

The political character of the Security Council has caused difficulties in connection with its judicial tasks. The willingness of the Member States to act tend to depend on what is favourable to them, and not necessarily in accordance with legal consistency. The situation with five permanent members who can veto decisions on these matters means that these five states have considerable power in relation to not interfering in a situation when it does not want to, or whether or not to condemn uses of force without prior authorization.

The Security Council lacks an important instrument when carrying out its tasks; there is no standing UN force under Article 43 of the Charter and mandates must be given to

¹²⁸ S/Res. 788, 19 Nov. 1992.

¹²⁹ Gowlland-Debbas (2000) page 375.

Member States. As a consequence, not only will Member States of the Council, and permanent members in particular, have power concerning actions to be taken. Any Member State of the UN will also have stronger influence than originally intended on situations in which UN gets involved than originally intended, since they are the ones contributing to the intervening forces.

The lack of clear rules concerning the interpretation of Security Council resolutions has caused problems regarding the determination of the content of such resolutions. This is a problem, as individual Member States, and not the Council itself, may be the ones deciding when the use of force is authorized. We have seen this tendency, particularly with regard to the 2003 invasion of Iraq. This is not in accordance with the Charter, which grants this role to the Security Council. Wide interpretations by certain Member States may impose risks on the Security Council's ability to take effective measures. The possibility of Member States carrying out their mandate contrary to the intended meaning of a resolution, may lead the Members of the Security Council to be reluctant to adopt resolutions.¹³⁰ If a permanent member takes this view, the situation could well turn out as during the Cold War, with the Council paralysed from acting caused by the veto.

The situations in which the Council has taken measures, and particularly Iraq, will also send signals to the Council itself the of need for explicit unambiguous provisions of resolutions. For the Council to be an effective organ, regulating the use of force, it is important that resolutions are specific and clear on what the Member States are empowered to do, and which powers remains with the Council. Otherwise, there may be a risk that the prohibition of use of force, with Chapter VII measures as one of two legal exceptions, will be undermined.

At the same time, it is apparent that states seek to justify their actions as either self-defence or as according to a mandate from the Security Council. This shows that despite frequent resorts to force, states do not consider the provision of the Charter Article 2(4)

¹³⁰ Lobel and Ratner (1999) page 125-130.

to be a dead letter. Instead, uses of armed force must be seen as violations of the principle, rather than changes of law.

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